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TITLE TO PROPERTY, TITLE TO MARRIAGE: THE SOCIAL FOUNDATION OF ADVERSE POSSESSION AND COMMON LAW MARRIAGE

John L. McCormack*

I. INTRODUCTION

Property and marriage are both ancient and nearly universal social institutions. Property defines relationships between persons and society with regard to assets, resources, or other objects of value. Marriage defines relationships between the spouses individually and between the spouses and society. Both institutions involve social positions (“owner” or “spouse”) that may be acquired formally or informally. An individual may acquire property owned by another by formal transfer or informally, by adverse possession. Similarly, legal marriages may be created formally, by license and approved ceremony, or informally by proof of a common law marriage or by other means.¹

Superficially, the legal doctrines of adverse possession and common law marriage appear to have little or nothing in common. Nevertheless, commentators have observed similarities between these apparently unrelated doctrines. Legal historian Hendrik Hartog observed that in nineteenth century America, a spouse might lose the “title” to his marriage by not acting to challenge a subsequent informal marriage entered into by his spouse.² “But, as with adverse possession in property law, so in these cases the ‘rightful title holder’ could eventually lose the capacity to challenge the marriage if he sat on his rights in the face of his wife’s ‘open and notorious’ adultery (*i.e.*, living as the wife of another

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¹ See, e.g., TEX. FAM. CODE ANN. §§ 2.401(a), 2.402 (Vernon 2005). In Texas, the existence of an informal marriage may be established by proof of a common law marriage in “a judicial, administrative, or other proceeding” or the execution and registration of a “declaration of informal marriage” by the parties on a government prescribed form. *Id.* Also, an informal marriage could become legally valid by proof of a ceremonial, formal marriage that did not, in fact, take place.

² Hendrik Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America*, 80 GEO. L.J. 95, 123 (1991).

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man).”³ Chief Judge Richard Posner has also perceived a similitude between the two doctrines, stating:

[c]ommon law marriage is thus to domestic relations law what the doctrine of adverse possession is to property law a way of curing formal defects in a legal status. And just as a person who has acquired title by adverse possession has as good a title as someone who acquires it by a formal conveyance, so a common law spouse has the same rights as any other spouse.⁴

The doctrines are alike in conferring legal statuses (“owner” or “spouse”) on individuals who have behaved as if they actually had them, even though the formal requirements for acquiring those statuses were not satisfied.⁵ In adverse possession, the status is “owner” and relates to property, real or personal.⁶ With reference to common law marriage, the status is “spouse” and relates to another individual who also has the status of “spouse.”

Both doctrines require communication indicating that the individual holds the legal status of owner or spouse. A person who claims the status of spouse through common law marriage must show that the couple “h[e]ld themselves out’ to the world as married.”⁷ Adverse possession generally has to be “actual” and “open and notorious[.]”⁸ In

³ *Id.*

⁴ *Barron v. Apfel*, 209 F.3d 984, 986 (7th Cir. 2000) (Posner, C.J.). See also Jessica A. Clarke, *Adverse Possession of Identity: Radical Theory, Conventional Practice*, 84 OR. L. REV. 563, 564 (2005). Clarke also sees a similarity between adverse possession and common law marriage:

In each case, the elements of a legal claim are strikingly similar: physical proximity, notoriety and publicity, a claim of right, consistent and continuous behavior, and public acquiescence. Moreover, while the law protects the interests of the parties immediately concerned, protection of third-party interests and social expectations turns out to be the dispositive factor in each case.

Id.

⁵ See BRUCE J. BIDDLE & EDWIN J. THOMAS, *ROLE THEORY: CONCEPTS AND RESEARCH* 67-69 (1966).

⁶ See Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119, 120 (1988-89) (discussing adverse possession of personal property).

⁷ See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 105 (2d ed. 1988).

⁸ WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 854 (3d ed. 2000); see also Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2441-43 (1994) (noting that the “open and notorious” requirement is harder to

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other words, common law spouses must have acted married and adverse possessors of real estate must have behaved as owners, so as to communicate that they were spouses or owners. Finally, adverse possessors must have acted like owners for a substantial period of time.⁹ By contrast, the common law marriage doctrine of most jurisdictions does not require any specific period of acting married.¹⁰ Even though no specific period of so acting is normally required, available evidence suggests that common law marriage claims may be more likely to prevail if there was an extended period of cohabitation.¹¹

Adverse possession and common law marriage make more probable that those who hold themselves out as owners or spouses will be treated as owners or spouses under the law.¹² Consequently, the doctrines may serve to protect expectations of adverse possessors, spouses of informal marriages, and the people who interact with them.

This Article will show that adverse possession and common law marriage are related legal doctrines in that they share a common social foundation, a core component of human social ordering, which legal

apply in adverse possession of personal property cases because it may move and land does not).

⁹ 735 ILL. COMP. STAT. 5/13-101 (2006) (twenty years); NEV. REV. STAT. ANN. § 11.150 (LexisNexis 1998) (five years); OR. REV. STAT. ANN. § 105.620 (West 2005) (ten years); UTAH CODE ANN. § 78-12-12 (2002) (seven years).

¹⁰ For a statute that required a specific period, see e.g., N.H. REV. STAT. ANN. § 457:39 (LexisNexis 2007) (New Hampshire statute requiring at least a three year period of cohabitation); Clarke, *supra* note 4, at 571 n.32; H.R. 427, 2005 Gen. Ct., 159th Sess. (N.H. 2005) (a 2005 bill to repeal this statute and abolish common law marriage that was introduced in the New Hampshire House).

¹¹ CLARK, *supra* note 7, at 105 (stating that there are cases that go a long way toward basing a holding of common law marriage upon well established and long continued cohabitation).

¹² See Walter O. Weyrauch, *Informal and Formal Marriage—An Appraisal of Trends in Family Organization*, 28 U. CHI. L. REV. 88 (1960) (describing types of informal marriages other than Common law marriage, including putative marriage and marriage by proxy or estoppel). See also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 202-04 (2d ed. 1985). A “formal marriage” is one that complies with state prescribed formalities (which may include a license and ceremony) for contracting a marriage. *Id.* The term “common law marriage” refers to an American legal doctrine that may make some informal marriages legally effective. *Id.* England had various forms of legally recognized informal marriage. *Id.* On the continent, a legal marriage could be completed by a contract between the parties until the middle of the sixteenth century when the Council of Trent prescribed a ceremony and certain formalities. *Id.* Lord Hardwicke’s Act (1753) generally abolished informal marriage in England by giving the Church of England and the state the sole power to form marriages and to publicize them to society. *Id.* See also Stuart J. Stein, *Common-Law Marriage: Its History and Certain Contemporary Problems*, 9 J. FAM. L. 271, 272 (1969).

philosopher Lon Fuller¹³ called the “language of interaction.”¹⁴ Basically, the language of interaction includes shared norms that tell people how to behave and the likely behavior they may expect from others in various social contexts. This Article will show how adverse possession and marriage-like cohabitation generate expectations that there is ownership or a marriage. At some point, these expectations eventually may lead to legally binding conclusions that the parties are owners or spouses, even without any showing of reliance on them.

After showing how adverse possession and common law marriage function to make more reliable expectations of ownership or marriage based on persons acting like owners or those in a marriage, this Article then considers whether adverse possession or common law marriage doctrine should be modified, abolished, or extended.

When social norms¹⁵ become a basis of laws, those laws may tend to persist even when the social and economic conditions that gave rise to them have changed or disappeared. For example, adverse possession originated when the distinction between ownership and possession was blurred or nonexistent and where there were no comprehensive, centralized systems of property records that could be used to identify owners and what they owned. Currently, governmentally maintained central registries (recording or title registration) effectively publicize most real estate claims in the developed world. Continued recognition of adverse possession of real estate in its present form is contrary to the policy behind recording and registration laws that title should be ascertainable by examining governmentally maintained records. To justify retention of the adverse possession doctrine, some sufficient modern policy should be identified.

For personal property claims, there are a limited number of governmental and private registries. For example, there are registries for motor vehicles and certain pedigreed animals.¹⁶ Because of the absence

¹³ The late Lon Fuller was a Professor of Law at the law schools of the University of Oregon, Duke University, and Harvard University.

¹⁴ See LON L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* 213 (Kenneth I. Winston ed., 1981) (referring to “customary law[,]” which was the basis of “a language of interaction”).

¹⁵ Here the term “norm” is used to refer to what people believe that they may expect from others and what others may expect from them in particular social contexts. Norms define these expectations. See FULLER, *supra* note 14, at 148; JOSE LOPEZ & JOHN SCOTT, *SOCIAL STRUCTURE* 24-26 (2000).

¹⁶ See Bibas, *supra* note 8, at 2468; Bruce W. Burton, *In Search of John Constable's the White Horse: A Case Study in Tortured Provenance and Proposal for a Torrens-Like System of Title*

of effective central registries for personal property claims, there may be a greater need for adverse possession or other doctrines to determine the priority or validity of those claims.

However, with regard to real estate, there is some evidence that adverse possession may be completely dispensable.¹⁷ But adverse possession does serve to cure some title problems, mainly caused by deficiencies in recording systems, and to resolve boundary disputes. There are two types of adverse possession: “short-term” commonly “under color of title”¹⁸ and “long-term.”¹⁹ Short-term adverse possession is a needed and useful title-clearing tool, and clearing title for persons in possession holding under invalid written conveyances (“color of title”) justifies its retention. However, long-term adverse possession is an anachronism no longer adequately justified by any contemporary interest or policy. Its boundary dispute settling function can be performed by other doctrines, collectively referred to as “practical location of boundaries.” These doctrines are focused on boundary dispute cases and are capable of resolving them at least as efficiently as adverse possession without the anomalous results that adverse possession sometimes produces.²⁰

Registration for Artwork, 59 FLA. L. REV. 531 (2007) (proposing official registration systems for artwork).

¹⁷ American Torrens title registration laws usually prohibit any adverse possession of registered land. See, e.g., MINN. STAT. ANN. § 508.02 (West 2002); *Konantz v. Stein*, 167 N.W.2d 1, 5 (Minn. 1969). Adverse possession is contrary to a basic Torrens policy, that the actual title and the title shown in the register ideally should be identical. However, boundaries are not normally registered for practical reasons. If there is an application to register boundaries that will be binding on neighbors, they must be notified and given an opportunity to be heard. See, e.g., Julie A. Bergh, *The Torrens System*, in REAL ESTATE LAW (Minn. Practice Series) § 3.32 (Eileen M. Roberts ed., 2006). Otherwise, there may be a taking of their property without due process of law. In Minnesota, practical location of boundaries has been applied to Torrens registered land in some exceptional cases. *Id.* at § 3.24. Traditionally, lands owned by federal, state, or local governments are not subject to adverse possession. Currently, adverse possession of government owned land in some instances is permitted. See, e.g., Color of Title Act, 43 U.S.C. § 1068 (2000).

¹⁸ James H. Backman, *The Law of Practical Location of Boundaries and the Need for an Adverse Possession Remedy*, 1986 BYU L. REV. 957, 959-61 (1986).

¹⁹ *Id.*

²⁰ For example, in rare instances, adverse possession has enabled squatters to “steal” land from owners, however, reported adverse possession cases usually involve parties who have adjoining or nearby parcels. Nonetheless, squatter cases have fascinated some scholars. See generally, Lee Anne Fennell, *Efficient Trespass: The Case for “Bad Faith” Adverse Possession*, 100 NW. U. L. REV. 1037 (2006) (providing economic and other theories to explain or justify the squatter cases); Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1169-71 (2007) (same).

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While long-term adverse possession is an anachronism, common law marriage doctrine appears today to be more in harmony with presently accepted—but by no means universal—social values and norms than ever before.

With some exceptions, largely involving the rights of children, modern law reflects a general policy that the internal affairs of a marriage are private matters between the partners.²¹ Contemporary legal norms applicable to marriage generally have very little to say about what each party may expect from the other within the relationship.²² The parties are generally free to form those expectations themselves. The legal norms do not buttress the dominance of the husband as they once did. The reciprocal traditional duties of the wife to provide certain services and of the husband to provide support have largely disappeared from general social norms of marriage and are disappearing from the law as well.²³ In fact, whether the parties are actually legally married is only relevant in a few situations, mainly those involving legal property or benefit and entitlement rights.²⁴

Today, many believe that people should be able to form domestic partnerships without having to get approval from government or elsewhere.²⁵ At the same time, people believe that domestic partners should be able to adopt a legally defined social status that includes rights and responsibilities for their partnership.²⁶ The American Law Institute has promulgated model legislation that reflects this belief.²⁷

²¹ Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (1992); Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage*, 63 LA. L. REV. 243 (2003).

²² This has been true for a long time. See FULLER, *supra* note 14, at 149.

²³ Twila L. Perry, *The "Essentials of Marriage:" Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1 (2003).

²⁴ Diane S. Kaplan, *Why Truth is Not a Defense in Paternity Actions*, 10 TEX. J. WOMEN & L. 69 (2000). Whether parties are actually married may be material in some paternity cases. *Id.* Existence of a legal marriage is a basis of the presumption that a child born during a marriage is the child of both spouses. *Id.* With scientific advances in DNA identification, it is questionable whether this presumption will remain viable. *Id.*

²⁵ Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1163 (2006) (arguing that civil marriage should be abolished and it "should become solely a religious and cultural institution with no legal definition or status."); Daniel A. Crane, A "Judeo-Christian" Argument for Privatizing Marriage, 27 CARDOZO L. REV. 1221 (2006) (same).

²⁶ See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.04 (2002). Generally, property acquired by domestic partners will be considered "domestic-partnership property" if it would have been classified as marital property if they had been married. *Id.* The partners may be of the

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Common law marriage seems to reflect recent trends in public opinion; however, the doctrine was widely recognized in the nineteenth century. By 1929, it was still authorized by the laws of roughly half the states.²⁸ Currently, the doctrine is recognized in only ten states and the District of Columbia.²⁹ Opponents of common law marriage used both efficiency and moral arguments to support its abolition. One apparently persuasive argument was that formal certified marriage made proof of marriage based property rights and other spousal claims, such as for entitlement benefits, simpler and more efficient. Yet, as this Article will show, marriage certificates are not very good evidence of the existence of a marriage at any particular time³⁰

II. ADVERSE POSSESSION AND COMMON LAW MARRIAGE

A. *Adverse Possession*

Adverse possession, in some form, is recognized in all jurisdictions in the United States and in other jurisdictions following the common law

same or opposite gender and they may make “premarital agreements” to govern their relationship. *Id.* at §§ 6.03, 7.01.

²⁷ See generally PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 26.

²⁸ CHESTER G. VERNIER, 1 AMERICAN FAMILY LAWS § 26 (1931).

²⁹ The ten states are Alabama, Colorado, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Texas, and Utah. See also *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995) (in which the State of Washington arguably recognized common law marriage in the guise of “stable, marital-like relationship.”). But see *PNC Bank Corp. v. Worker’s Comp. Appeal Bd.*, 831 A.2d 1269 (Pa. Commw. Ct. 2003) (prospectively abolishing common law marriage in Pennsylvania); 23 PA. CONST. STAT. ANN. § 1103 (West Supp. 2007) (abolishing common law marriage prospectively effective January 1, 2005); *Costello v. Worker’s Comp. Appeal Bd.*, 916 A.2d 1242 (Pa. Commw. Ct. 2007).

³⁰ There is no centralized reliable source of information that can be used to examine the title to a marriage equivalent to the land title records used to assess real estate titles. It is unlikely that such a source will ever exist. People move—land does not. Marriages may be formed in one jurisdiction and dissolved in another by court judgment or death of a spouse. This makes creation of centralized reliable record usable to examine titles to marriages a daunting political and legal task. Allowing informally married spouses to publicly register their marriages should eliminate any proof of marriage advantage of formally certified marriage. See, e.g., TEX. FAM. CODE ANN. § 2.401 (Vernon 2005). In Texas, a couple may marry by executing a declaration of informal marriage. *Id.* The declaration is certified by a County Clerk and recorded. *Id.* A recorded certificate is prima facie evidence of marriage. *Id.* at § 2.402. In Texas, couples may also marry informally under the usual common law marriage rules without executing and recording a declaration of informal marriage. *Id.*

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legal tradition.³¹ The doctrine—or something like it—is also found in countries and societies outside the common law tradition.³²

When a court decides that the formal requirements for adverse possession have been satisfied, the adverse possessor gets a legal title to the property and the former owner loses it. There is a related doctrine called “prescription” under which an adverse user may acquire an easement instead of general ownership.³³ After legal validation, a title acquired by adverse possession has equal standing with a title acquired by conveyance.³⁴

While jurisdictions may differ in some particulars, the general elements necessary for acquiring title by adverse possession are essentially similar in all jurisdictions: actual possession that is adverse, hostile (without permission of the owner), open, notorious, visible, exclusive, and continuous for the statutory period.³⁵ Some jurisdictions also require claim of title or right, or good faith.³⁶ In addition to adverse possession, certain doctrines applicable to boundary disputes may also

³¹ See 4 HERBERT THORNDIKE TIFFANY & BASIL JONES, TIFFANY REAL PROPERTY § 1132 (2003) (stating that in jurisdictions in the United States that adopted the Torrens system of land title registration, adverse possession of registered land was not initially permitted); 1 LA. PRAC. REAL EST. § 5:1 (2000) (in Louisiana, a hybrid civil law jurisdiction, the equivalent of adverse possession is called “acquisitive prescription”); 10 OLAN B. LOWREY, ADVERSE POSSESSION, THOMPSON ON REAL PROPERTY § 87.01 (David A. Thomas ed., 2d. ed. 1998) (in the common law tradition, “prescription” commonly refers to acquisition of an easement through adverse use).

³² THOMAS GLYN WATKIN, THE ITALIAN LEGAL TRADITION 218 (1997) (Italian law recognizes “*usucapione*[.]” a concept derived from the Roman law institution of *usucapio*, meaning acquisition of moveable or immovable property by possession for a given length of time). See also ANDREW BORKOWSKI, TEXTBOOK ON ROMAN LAW 200-05 (1994) (stating that the *Code of Hammurabi* (Babylonian, ca 1780 BC) provided for loss of possessory rights through a form of adverse possession); ROGER BERNHARDT ET AL., PROPERTY—CASES AND STATUTES 46 (2005).

³³ See, e.g., ROMUALDO P. ECLAVEA, ADVERSE POSSESSION AND PRESCRIPTION 2 N.Y. JUR. 2D § 2 (Westlaw 2004).

³⁴ 3 AM. JUR. 2D *Adverse Possession* § 248 (2002).

³⁵ 3 AMERICAN LAW OF PROPERTY § 15.2 (A. James Casner ed., 1952) (noting that the statutory period is in the statute of limitations applicable to the action that the owner may bring to eject the possessor). See also Lon L. Fuller, *Adverse Possession—Occupancy of Another's Land Under Mistake as to Location of a Boundary*, 7 OR. L. REV. 329, 329-30 (1928) (stating that adverse possession could be reduced to three elements: “(1) Possession must be entered into and maintained for the statutory period. (2) The possession must operate to give the owner of the land a cause of action. (3) The possession must be ‘unaccompanied by any recognition, express or inferable from circumstances, of the right’ of the owner.”).

³⁶ See STOEBUCK & WHITMAN, *supra* note 8, at 854.

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give a party in possession title or other rights despite the owner's paper or record title.³⁷

Statutes of limitation provide a foundation for adverse possession, but most of the legal doctrine is judge-made. The statutes provide for a limited amount of time after a cause of action accrues,³⁸ during which the owner of property being adversely possessed may sue to abate the conduct.³⁹ Once the time runs out, a lawsuit to recover the land is barred by the statute.

Some statutes provide for short-term adverse possession if some additional factors are present.⁴⁰ For example, in Illinois, the long-term statute provides for a period of twenty years.⁴¹ However, if the possession is also under "color of title" (under a defective written conveyance), in good faith, and the possessor pays the real property taxes, the short-term statute provides for a period of seven years.⁴²

³⁷ See generally Backman, *supra* note 18, at 958. The set of doctrines is usually referred to as "Practical Location of Boundaries." *Id.*

³⁸ See LOWREY, *supra* note 31, at § 87.01 (the statutes provide for periods that range from five to forty years, with most falling within the ten to twenty year range.); see also R. H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 333 (1983) (describing a study by Professor Helmholz revealing that courts in actual cases seldom approach the subject by determining whether a cause of action accrued against the possessor).

³⁹ See CHARLES C. CALLAHAN, *ADVERSE POSSESSION* 47-49 (1961) (stating that the antecedent of modern statutes of limitation was the Statute 21 Jac. I, c. 16 (1623) which concerned actions to recover possession and time limitations on the rights to seek legal remedies to vindicate property rights existed for centuries before this statute).

⁴⁰ See, e.g., Shane P. Raley, Note, *Color of Title and Payment of Taxes: The New Requirements Under Arkansas Adverse Possession Law*, 50 ARK. L. REV. 489, 496-97 (1997) (stating that the possessor must hold title under some written instrument, such as a deed or will, which was defective or invalid).

⁴¹ 735 ILL. COMP. STAT. § 5/13-101 (2003). The Illinois statute states:

Twenty years—Recovery of land. No person shall commence an action for the recovery of lands, nor make an entry thereon, unless within 20 years after the right to bring such action or make such entry first accrued, or within 20 years after he, she or those from, by, or under whom he or she claims, have acquired title or possession of the premises

Id.

⁴² *Id.* at §13-109. The Illinois statute goes on to state:

Payment of taxes with color of title. Every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, and who for 7 successive years continues in such possession, and also, during such time, pays all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal

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Actually, the time period in which the owner may sue is not as definite as the applicable statute of limitations might indicate. The statute begins to run when a right to sue for recovery of the property arises in favor of the owner. If, at the commencement of possession, the owner of real estate is under a legal disability denying the owner capacity to sue, the statute will not begin to run until, if ever, the owner acquires capacity.⁴³

Early statutes of limitation did not provide—and numerous modern statutes still do not provide—that the adverse possessor becomes the owner after the statute runs out. At the time the doctrine was being formed, courts could have held that the running of the statute simply protected the possessor from being sued, leaving intact the owner's rights in the property. Even if an action was barred, self-help could still be used to recover possession. But by 1757, it was held that the effect of the statute running out was more than just the barring of a remedy; instead, the adverse possessor got a “positive title” and the former owner's title was taken away.⁴⁴ Finally, in England, the 1833 Real Property Limitation Act expressly provided that the running of the period of limitation extinguished the right as well as the remedy of the previous owner.⁴⁵

B. Common Law Marriage

Common law marriage is a legal doctrine that may give an informal marriage legal standing.⁴⁶ When the requisites for common law marriage have been established, the common law spouse is considered a legal spouse. Common law marriages are nearly identical in legal standing to licensed formal marriages.⁴⁷ Furthermore, common law

owner of such lands or tenements, to the extent and according to the purport of his or her paper title.

Id.; cf. LOWREY, *supra* note 31, at § 87.01 (stating that similar provisions in other states provide for periods ranging from three to ten years).

⁴³ See Helmholz, *supra* note 38, at 336 (discussing cases involving legal disabilities of record or true owners, which are among the exceptional cases that courts analyze by considering whether a cause of action accrued).

⁴⁴ Taylor v. Horde, 1 Burr. 60, 97 Eng. Rep. 190 (1757).

⁴⁵ CALLAHAN, *supra* note 39, at 50.

⁴⁶ See Weyrauch, *supra* note 12, at 105-06 (explaining that courts have also used other doctrines to sanction informal marriages, such as marriage by estoppel, marriage by presumption, and marriage by ratification).

⁴⁷ See Peter Nash Swisher & Melanie Diana Jones, *The Last-in-Time Marriage Presumption*, 29 FAM. L.Q. 409, 427-28 (1995). Swisher and Jones discuss a minority view that a subsequent common law marriage should not be entitled to the last-in-time marriage

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spouses have essentially the same rights as formally married spouses.⁴⁸ In theory, once a common law marriage is formed, the parties are legally married and if one of them should subsequently marry another in a formal ceremony, the subsequent formal marriage is void and bigamous.⁴⁹

As of 2007, only ten states and the District of Columbia authorized common law marriages.⁵⁰ However, most states recognize common law marriages formed by couples while domiciled in an authorizing jurisdiction.⁵¹ But, in some states, common law marriages formed elsewhere may not be recognized.⁵²

The legal elements of common law marriage include: (1) capacity to make a contract of marriage, (2) a present agreement to marry, (3) cohabitation, and (4) a holding out to the community that the parties are married.⁵³ "It is frequently said that there is no such thing as a secret, or clandestine, common law marriage."⁵⁴ In contrast to adverse possession, there is generally no legally specified time period that a couple has to cohabitate to create a basis for a claim of common law marriage.⁵⁵

The elements of common law marriage operate in a context of presumptions and allocation of burden of proof. In some of the states that permit common law marriage, it is difficult for a proponent to prove

presumption of validity. *Id.* Some judges may be hostile toward common law marriage and this may disfavor a claim by a common law marriage spouse. *Id.*

⁴⁸ *Barron*, 209 F.3d at 986.

⁴⁹ See *Crosson v. Crosson*, 668 So. 2d 868, 873 (Ala. Ct. Civ. Apps. 1995) (indicating that a spouse of the prior marriage may have the burden of proving that the prior marriage was legally terminated); see also *Swisher & Jones*, *supra* note 47, at 409-10 (arguing that this doctrine can have the practical effect of nullifying a marriage that was not, in fact, legally terminated).

⁵⁰ Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 1011 (2000). But see *PNC Bank Corp.*, 831 A.2d at 1281 (in which Pennsylvania abolished common law marriage prospectively in 2003).

⁵¹ See Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 716 (1996) (explaining, however, that courts in states that do not recognize common law marriage sometimes refuse to recognize common law marriages entered into by couples domiciled in those states while temporarily residing in jurisdictions that do authorize them).

⁵² John C. Hurley, *Common Law Marriage: Who Is Insured as a Spouse?*, THE NATIONAL UNDERWRITER COMPANY CLAIMS MAGAZINE, Mar. 2003, at 33.

⁵³ *Id.*; see also *Fenton v. Reed*, 4 Johns 52, 4 Am. Dec. 244 (N.Y. 1809); Bowman, *supra* note 51, at 712-13.

⁵⁴ Bowman, *supra* note 51, at 713.

⁵⁵ Clarke, *supra* note 4, at 571 n.32.

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a contract to marry.⁵⁶ In other states, the contract to marry may be presumed from the couple cohabitating and holding themselves out to society as married.⁵⁷ Where this presumption is applied, there will be proof of a contract to marry regardless of whether the parties actually made one.

If the contract must be separately proved, the proponent of the marriage may face an insurmountable barrier. Couples in informal marriages commonly drift into the relationship intending to be married at some point, without a conscious express agreement to be husband and wife.⁵⁸ Even if a contract was expressly made, if one of the spouses is deceased, the survivor is likely to be the only living witness. In some jurisdictions, the Dead Man's Statute may prevent the survivor from testifying at all about statements made by the decedent.⁵⁹ If the survivor is permitted to testify about the contract to marry, her or his testimony may be given little weight as it is coming from an interested witness.

In some states that do not formally authorize common law marriage, proof of cohabitation and proof that the couple held themselves out as being married raises a presumption that a valid ceremonial marriage took place.⁶⁰ Essentially the same facts (cohabitation and holding out) that may raise a presumption of an agreement to marry in common law marriage jurisdictions support the presumption of a valid ceremonial marriage.⁶¹

⁵⁶ Stein, *supra* note 12, at 286.

⁵⁷ Bowman, *supra* note 51, at 715; see also Kathryn S. Vaughn, *The Recent Changes to the Texas Informal Marriage Statute: Limitation or Abolition of Common Law Marriage?*, 28 HOUS. L. REV. 1131 (1991); cf. John B. Crawley, *Is the Honeymoon over for Common-Law Marriage: A Consideration of the Continued Viability of the Common-Law Marriage Doctrine*, 29 CUMB. L. REV. 399, 407-08 (1999) (explaining that a marriage agreement may be inferred from the parties' circumstances).

⁵⁸ Vaughn, *supra* note 57, at 1153-54.

⁵⁹ CLARK, *supra* note 7, at 106.

⁶⁰ *Id.* at 105; Stein, *supra* note 12, at 281.

⁶¹ See Stein, *supra* note 12, at 281; see also *King v. Clichfield R.R. Co.*, 131 F. Supp. 218, 219 (Tenn. Dist. Ct. 1955). Applying Tennessee law, the court stated:

It may be observed that common law marriages have been replaced by statutory or ceremonial marriage in Tennessee. The statement appears in Court decisions that Tennessee does not recognize common law marriages. Yet it is well established that where a man and a woman live together as husband and wife over a period of years, neither of them, nor any third party, may attack their relationship as husband and wife.

Id.

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To summarize, simply counting the number of states that do or do not authorize common law marriages does not give a complete picture of the degree to which informal marriages may be legally validated. Some common law marriage states have strict proof requirements for common law marriages, making them very difficult to prove. On the other hand, informal marriages may be legally validated under the presumption of marriage based on cohabitation and holding out in some states, regardless of their positions on common law marriage. Common law marriages may also be given at least some validity through doctrines such as marriage by estoppel.⁶² Finally, common law marriages formed in other jurisdictions may be legally validated because of choice of law rules, previously discussed.

III. PRIOR EXPLANATIONS OF COMMON LAW MARRIAGE ARE UNSATISFACTORY

Numerous commentators have offered rationales for adverse possession.⁶³ This is not remarkable. The doctrine presents an interesting and challenging legal puzzle: it may award land to a trespasser who diligently pursues the wrong without any compensation to the former owner of the property. By contrast, there have been few attempts to explain why common law marriage was accepted as a legal form of marriage in the United States. The most common explanations for its legal acceptance are offered by opponents who disapprove of it and argue for its non-recognition.

A. *Frontier Conditions*

A common explanation for the recognition of common law marriage in some jurisdictions is that it was a response to the “frontier conditions” that once existed in them.⁶⁴ On the frontier, it is argued, travel was slow and difficult, and could be dangerous. Settlements were sparse, making it difficult to reach clergy and officials to preside over ceremonial

⁶² Robert E. Kendrick, *Informal Marriage in Tennessee — Marriage by Estoppel, by Prescription and by Ratification*, 3 VAND. L. REV. 610, 615 (1950).

⁶³ See Bowman, *supra* note 51, at 731-54 (discussing additional rationales for the abolition of common law marriage); see also CALLAHAN, *supra* note 39, at 82-111; Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1128-33 (1984); Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2434-56 (2001).

⁶⁴ See Ryan P. Newel, Comment, “To Be Sure He is My Husband Good Enough,” or is He? *An Analysis of Common Law Marriage in Pennsylvania*, 109 PENN. ST. L. REV. 337 (2004) (providing a recent example of a common law marriage opponent using the frontier conditions argument); see also Weyrauch, *supra* note 12, at 97.

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marriages.⁶⁵ Presently, it is argued, marriage licenses may conveniently be obtained and clergy or officials authorized to preside are readily available. Accordingly, those who think the doctrine ought to be abolished argue that because of a change of circumstances, common law marriage is no longer justified.⁶⁶

Perhaps informal marriage was a response to conditions on the frontier. The “frontier conditions” argument, however, contains an unstated assumption that formal marriage is the ideal and that common law marriage, a deviation from that ideal, is justifiable only by special circumstances. A preference favoring formal marriage should be based on some significant relevant characteristic that informal marriage lacks, and not an unstated assumption.

The “frontier conditions” argument is also somewhat diminished because it does not explain why three states among the original thirteen colonies—Massachusetts,⁶⁷ New York,⁶⁸ and Pennsylvania⁶⁹—took opposing positions on common law marriage. Were there “frontier conditions” in New York and Pennsylvania that caused acceptance of common law marriage in those states that did not exist in Massachusetts, which never recognized the doctrine?⁷⁰ Furthermore, Wyoming has never officially recognized common law marriage even though “frontier conditions” persisted in that state well into the twentieth century.⁷¹

More importantly, proponents of the “frontier conditions” argument base their contention on assumptions about what frontier conditions actually were instead of historical records. Were clergy and judges actually so scarce on the frontier? Was it really so difficult for couples to have their marriages solemnized by clergy or judges? Perhaps the historical record would show that these conditions did exist. But without citation of support in the historical record, the “frontier condition” argument lacks a credible basis.

⁶⁵ See *McChesny v. Johnson*, 79 S.W.2d 658, 659 (Tex. Civ. App. 1934); *In re Soeder's Estate*, 220 N.E.2d 547, 562 (Ohio Ct. App. 1966); see also *Bowman*, *supra* note 51, at 717 (explaining the “frontier conditions” rationale); FRIEDMAN, *supra* note 12, at 203.

⁶⁶ See *Roddie Burris, S.C. bill poised to cut ties that bind: Measure advancing in Legislature would make common-law marriage illegal*, THE STATE, Apr. 12, 2006 (providing a fairly recent statement of the frontier conditions argument).

⁶⁷ *Milford v. Worcester*, 7 Mass. 48, 57 (1810).

⁶⁸ *Fenton v. Reed*, 4 Johns 52 (N.Y. 1809).

⁶⁹ *Rodebaugh v. Sanks*, 2 Watts 9 (Pa. 1833).

⁷⁰ *Commonwealth v. Munson*, 127 Mass. 459, 470 (1879).

⁷¹ *In re Roberts' Estate*, 133 P.2d 492, 503 (Wyo. 1943).

2008] *Adverse Possession and Common Law Marriage* 475B. *Administrative Efficiency and Judicial Economy*

Some argue that formal marriage by licenses and approved ceremonies promotes administrative efficiency and judicial economy by creating lasting records and certificate evidence of the fact that a couple was legally married.⁷² On the surface, this argument appears to have substantial merit, yet upon closer examination, the argument becomes less than compelling. The perception of administrative efficiency is due to a seriously inadequate appreciation of what a marriage certificate actually may prove.

It is easier to prove the existence of a certified marriage. A marriage certificate is *prima facie* evidence of the fact of the marriage.⁷³ Unless sufficient contrary evidence is introduced, the certificate will establish the existence of the marriage. However, opponents of common law marriage have exaggerated the ease of proof advantage of certified marriages. The comments of an experienced state court judge suggest that not a lot of extra judicial and other resources are needed to prove the existence of a common law marriage. "Deciding whether a common-law marriage exists does require an additional determination from the factfinder, but the controlling elements of that determination are well-established, easy to apply, and predictable in result."⁷⁴

It may be widely under-appreciated that marriage certificates are not very reliable proof of the present existence of a marriage. Marriage certificates are evidence that the parties named were involved in a marriage ceremony referred to in the document. The certificate does not generally establish conclusively that the union was valid, that the parties then had capacity to marry, that the marriage was not subsequently dissolved, or that the people claimed to have been married are the same persons named as the parties to the marriage in the certificate. Moreover, there is no centralized system of records that can be examined to assess the legal history of a marriage—the "title" of a marriage—similar to the recording systems that enable title examiners to assess real estate titles. Marriages made in one jurisdiction may be dissolved in another by court judgment or death.

⁷² See Newel, *supra* note 64, at 354 (providing a recent statement of this argument, in which the involvement of the state or church in the marriage is incidental and not central, and other arguments against recognition of common law marriage).

⁷³ See, e.g., Robert A. Barker & Vincent C. Alexander, *Hearsay Exceptions Where Availability of the Declarant is Immaterial*, in 5 N.Y. PRAC., EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS § 8:56 (2006).

⁷⁴ Crawley, *supra* note 57, at 424.

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Even with the power of the Internet, centralizing the pertinent records for the United States and relevant foreign jurisdictions would be a costly and arduous legal and political task. Land does not move, and this greatly simplifies centralization of land title record systems. But in modern society many people move from state to state, country to country, and jurisdiction to jurisdiction. The possibility of the movement of people and the potential involvement of multiple jurisdictions complicate the examination of title to a marriage and the record-keeping task. Furthermore, in federal republics such as the United States, where states retain the power to regulate marriage formation, the problem is exacerbated by the existence of numerous separate jurisdictions in a single nation.

Not only can people move while land cannot, people can also testify. If parties or other witnesses are available, they can testify about the facts relevant to the issue of whether two people were married to each other at a relevant time.⁷⁵ Testimony may be used to support or to contradict marriage certificates. It follows that requiring marriages to be formed in a ceremony before an authorized official and certified may not achieve as much judicial or administrative economy as believed. In disputes where money, other property, or other valuable interests are at stake, the costs of litigating the validity of a particular marriage may not be avoidable whether the marriage was formed formally or informally, certified or not.

C. Formal Ceremonial Marriage Does Not Provide Any Better Safeguard Against Fraud

Claims of the superiority of ceremonial marriage over common law have also been supported by arguments that ceremonial marriages are formed in front of witnesses and publicized by registration of certificates.⁷⁶ This procedure, it is claimed, reduces the success of fraudulent claims of marriage.⁷⁷ This was the principal argument that led to the abolition of common law marriage in the State of New York in 1933.⁷⁸ However, common law marriages must be publicized during

⁷⁵ See John D. Fletcher, *Validity of Marriage*, 36 AM. JUR. PROOF OF FACTS 2d 441 (2006) (providing a comprehensive discussion of various questions and proof or other evidence that may be used when the validity of a particular marriage is litigated).

⁷⁶ Failure to register a marriage certificate does not invalidate a formal marriage.

⁷⁷ See P.M. BROMLEY, *FAMILY LAW* 27-29 (1971). This was the ostensible basis of Lord Hardwicke's Act (1853) which generally abolished informal marriage in England and required marriage to be performed publicly according to the rite of the Church of England. *Id.*

⁷⁸ Dubler, *supra* note 50, at 1000-03.

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their existence and will not be recognized unless it is proved that the couple publicized their marriage by holding themselves out to their community as married. Any publicity advantage of formal ceremonial marriage is further diminished if informally married spouses are permitted to register notice of their marriage in public records as they presently are in Texas.⁷⁹

D. Formal Ceremonial Marriage Does Not Better Protect the Stability of the Family

Protecting the institution of the family is another interest claimed to be advanced by licensed ceremonial marriage requirements. This is a worthy goal. However, formal marriage does not appear to presently promote family stability any better than does common law marriage.

Some who argue that forming marriages exclusively by licenses and ceremonies promotes family stability apparently believe that it is easier to escape a common law marriage compared to a formal one. It is no harder for formally married spouses to divorce than it is for those in common law marriages. The current national divorce rate for all marriages stands at about 50 percent. A spouse who abandons her or his common law spouse and children is just as legally accountable as is a formally married person.

Requiring people to learn the responsibilities of marriage and child rearing before they marry may advance the goal of protecting the family. Some churches require intended spouses to attend meetings at which the responsibilities of marriage are discussed before they will be married in the church.⁸⁰ This requirement may contribute to family stability by helping people to appreciate what they are undertaking before the final commitment to marriage is made. Ceremonies may work to impress upon people that something serious is happening. But under prevailing formal ceremonial marriage laws, there is nothing in the prescribed procedure that assures that the spouses will better understand their responsibilities to each other and any children or provides a safeguard against marriage by the irresponsible.⁸¹

⁷⁹ TEX. FAM. CODE ANN. §§ 2.401-2.402 (Vernon 2006).

⁸⁰ Dana Braga, *BRIDAL DIARY; Priest Shares the Meaning of Marriage in Pre-Cana Wedding Courses*, THE PATRIOT LEDGER, Mar. 12, 2005, Fam. Sec., at 10.

⁸¹ See ARIZ. REV. STAT. ANN. § 25-901 (West 2004) (legalizing "covenant marriage[,] which requires premarital counseling, a formal declaration of the permanence of the marriage, and grounds for divorce are limited); ARK. CODE ANN. § 9-11-801 (LexisNexis 2002) (same); LA. REV. STAT. ANN. §§ 9:234, 9:272-275, 9:307-309 (West 2000 & Supp. 2007)

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IV. WAS COMMON LAW MARRIAGE ABOLISHED TO PROMOTE RELIGIOUS CONTROL OVER FAMILIES, INHERITANCE, AND MORAL HABITS?

Some commentators argue that marriage was formalized and subjected to the jurisdiction of churches so that they could control family and inheritance systems as well as moral habits.⁸² There is support in the historical record for this view.

In the Western cultural tradition, until well into the Christian era, marriage and its dissolution was the product of agreements between individuals or families. Organized religion or government played little or no role.⁸³ England was not an exception.⁸⁴ Even after Church ceremonies presided over by priests were available and ecclesiastical courts claimed exclusive jurisdiction over marriage, England continued to recognize informal marriage.⁸⁵ After the English Reformation, the ecclesiastical courts passed jurisdiction over marriage to the Anglican Church in 1534. The Anglican Church sent representatives to the Council of Trent (1543-1563), which adopted the position that marriages would not be valid unless contracted in the presence of a priest and two witnesses.⁸⁶ At the Council, the Church of England formally endorsed this view. However, the requirement of a religious ceremony was not accepted in England and informal marriages were still valid until Lord Hardwicke's Act was passed in 1753.⁸⁷ The Act provided that a marriage was not valid unless it was solemnized according to the rites of the Church of England, in church, in the presence of a clergyman and

(same); see also Daniel W. Olivas, Comment, *Tennessee Considers Adopting the Louisiana Covenant Marriage Act: A Law Waiting to be Ignored*, 71 TENN. L. REV. 769 (2004) (providing a thoughtful critique of covenant marriage laws).

⁸² See, e.g., Cecilia A. Green, "A Civil Inconvenience"? *The Vexed Question of Slave Marriage in the British West Indies*, 25 LAW & HIST. REV. 1, 24 (2007).

⁸³ JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 33-35, 66 (1987); John J. Collins, *Marriage, Divorce and Family in Second Temple Judaism*, in FAMILIES IN ANCIENT ISRAEL 104, 108 (Don S. Browning & Ian S. Evison eds., 1997); Nikos A. Vrisimtzis, LOVE, SEX AND MARRIAGE IN ANCIENT GREECE 30 (1995).

⁸⁴ See *Regina v. Millis*, 8 Eng. Rep. 844 (1843) (in which it was incorrectly stated that informal marriage never existed in England); Clark, *supra* note 7, at 70.

⁸⁵ Franklin C. Setaro, *A History of English Ecclesiastical Law*, 18 B.U. L. REV. 102, 119-21 (1938); Brandy Schnautz Johnson, Note, *The Making of Marriage in Thirteenth Century England: Verb Tense, Popular Legalism, and the Alexandrine Law of Marriage*, 15 TEX. J. WOMEN & L. 271 (2006).

⁸⁶ GEORGE ELIOT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS 315-16 (1904).

⁸⁷ *Id.* at 435-60.

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witnesses.⁸⁸ Ecclesiastical jurisdiction over marriage continued in England until the Matrimonial Causes Act was passed in 1857.⁸⁹

In the United States, there were never any ecclesiastical courts with exclusive jurisdiction over marriage, and from the beginning there was separation of church and state. People wishing to marry formally had the alternative of civil ceremonies. Consequently, requiring people to formally marry would not necessarily coerce them into church marriages. The movement to abolish common law marriage in the United States that began near the beginning of the twentieth century and continued throughout, was not simply a matter of organized religions attempting to exercise control over people and their lives. The movement continued over a very long period of time driven by the powerful engine of social conformity. Two scholars have recently examined the abolition of common law marriage in New York⁹⁰ and California.⁹¹ In both states, abolition by legislation was preceded by highly publicized cases involving younger women who claimed property from older men or their estates as common law spouses. The notion that common law marriage could be used by an “adventuress” to appropriate money or other property from wealthy men may have motivated or influenced legislators’ votes. Women were not the sole gender allegedly aided in taking advantage of the other by the existence of common law marriage. It was also attacked on the ground that it facilitated the schemes of unscrupulous men who wished to take advantage of young women.⁹² Current lobbyists supporting abolition of common law marriage would be politically unwise to use the “adventuress” argument. Instead, contemporary opponents claim, among other things, that common law marriage undermines the family or is archaic or inefficient.⁹³

Legislatures are relatively tiny groups of people compared to the populations they represent. Legislators may react to a wide variety of influences, events, or arguments at any given time. The movement to abolish common law marriage was sustained and continued over many

⁸⁸ *Id.*

⁸⁹ Setaro, *supra* note 85, at 119-21.

⁹⁰ Dubler, *supra* note 50, at 957.

⁹¹ Charlotte K. Goldberg, *The Schemes of Adventuresses: The Abolition and Revival of Common-Law Marriage*, 13 WM. & MARY J. WOMEN & L. 483 (2007).

⁹² *Id.* at 513.

⁹³ See, e.g., “Quick Fix” on child brides: AG wants 21 as common-law marriage age, THE DENVER POST, June 22, 2006, at A-01.

decades. As the movement continued, various arguments were used to influence legislators or other lawmakers at different times.⁹⁴

In all societies, there are powerful forces for conformity. When formal marriage became the norm through the efforts of organized religions and others, informal marriage became viewed as aberrant behavior and was discouraged. Over decades, people were convinced by a variety of arguments that formal ceremonial marriage was so preferable to common law marriage that the latter should be prohibited. Forces for conformity aided the process of persuasion. As Professor Charlotte Goldberg demonstrates, the great irony is that as common law marriage is being abolished, new forms of it are being accepted and even authorized by law.⁹⁵

V. RATIONALES FOR ADVERSE POSSESSION

Some people are surprised when they learn about the adverse possession doctrine for the first time because it strikes them as approving and rewarding theft. Adverse possession enables a person to “steal” another person’s property by using it for a long time. Surprise is understandable given prevailing social norms that generally disapprove of theft.

A. *There is No Single, All Encompassing Satisfactory Explanation for Adverse Possession*

The law in action is complex human behavior, which often does not lend itself to easy explanation. Adverse possession is no different. No single rationale for adverse possession is completely satisfactory. Nonetheless, people have used various disciplines and approaches to produce apparently helpful insights into the operation and foundations of the doctrine. The common rationales include: avoiding problems caused by lost evidence, quieting titles to property, penalizing owners who do not protect their rights or rewarding those who do, encouraging the use of property, and protecting or recognizing reliance interests of adverse possessors and those with whom they deal.⁹⁶ Additionally,

⁹⁴ See *supra* Part III (considering some of the arguments supporting the abolition of Common law marriage).

⁹⁵ Goldberg, *supra* note 91, at 525-38; AMERICAN LAW INSTITUTE, PRINCIPLES OF FAMILY DISSOLUTION (2002).

⁹⁶ See JESSE DUKEMINIER ET AL., PROPERTY 112-15 (2006) (providing quotations or references to various works containing rationales for adverse possession).

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economic explanations have been presented.⁹⁷ These rationales vary in persuasiveness.

1. The “Punishment/Reward” Rationales

Some cases upholding adverse possession claims suggest that they are punishing owners who are not diligent in protecting their rights and rewarding possessors who are diligent in pursuing theirs.⁹⁸ The prototype Statute of Limitations enacted in 1623 said nothing about punishing or rewarding owners or adverse possessors. Instead, it began with: “For quieting of men’s estates. . . .”⁹⁹

Courts and commentators have realized that merely punishing owners and rewarding adverse possessors is, by itself, not a persuasive rationale for the doctrine.¹⁰⁰ Regardless of any economic constructs that may purport to justify punishing people for not defending their property and rewarding others for taking it, theft is against public policy and is no complement to social order and productive economic activity. Such activity is difficult, at best, in an environment of social disorder.

Some have argued that adverse possession rewards those who use property and punishes owners who do not because using land resources is good and not using them is bad. This belief might have been appropriate in the nineteenth century United States when the national economy was developing and conservation of natural resources was not broadly valued. During that era, adverse possession of undeveloped land might have been perceived by development-favoring judges as good.¹⁰¹ However, within the past forty years, the value of conserving resources and leaving lands undeveloped has become widely

⁹⁷ Thomas J. Miceli & C.F. Sirmans, *An Economic Theory of Adverse Possession*, 15 INT’L REV. L. & ECON. 161 (1995); Jeffrey M. Netter, Philip L. Hersch & William D. Manson, *An Economic Analysis of Adverse Possession Statutes*, 6 INT’L REV. L. & ECON. 217 (1986).

⁹⁸ See STOEBOCK & WHITMAN, *supra* note 8, at 853-60; Schiller v. Kucaba, 203 N.E.2d 710, 715 (Ill. App. Ct. 1964) (barring plaintiff from challenging the title defendants acquired by adverse possession because plaintiff’s grantors were guilty of laches, stating that “[c]ourts of equity aid the diligent and not the indolent.”).

⁹⁹ See CALLAHAN, *supra* note 39, at 92.

¹⁰⁰ See Hirshfield v. Schwartz, 110 Cal. Rptr. 2d 861, 875 (Cal. Ct. App. 2001) (“Adverse possession and prescriptive easements express a preference for use, rather than disuse, of land. They are designed not to reward the taker or punish the dispossessed, but to reduce litigation and preserve the peace by protecting long-standing possession.”).

¹⁰¹ See John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 841-46 (1994) (making the case that in order to further a policy of economic development, nineteenth century courts adopted a rule that an adverse possessor could prevail through temporary, sporadic use of “wild lands”).

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appreciated. Economic exploitation of land is no longer generally assumed to be for the good.¹⁰²

A recent article presents a variation on the Punishment/Reward rationale, in which the authors argue that adverse possession may serve as a redistributive mechanism.¹⁰³ Building on an argument that bad faith adverse possession can be justified in utilitarian terms,¹⁰⁴ the authors argue that squatters on urban land should have the benefit of short statutes of limitations (one or two years) to facilitate their acquisition of abandoned property.¹⁰⁵ They assert that “reasonably attentive owners” would not incur significant monitoring costs in urban areas “where it is virtually impossible for even the most careless owner not to notice an adverse possessor’s use of her land.”¹⁰⁶

There are some serious problems with this proposal. It assumes, without empirical support, that owners of urban land would be positioned to frequently monitor their land. If such a short statute of limitations were to be enacted, it is possible that cases would arise where the owners were poor, ill, or uneducated. If the goal is to promote “efficient trespass,” the personal characteristics of the parties are irrelevant.

It would also be more difficult to defend such a short statute of limitations for rural or wilderness land. Limiting application to urban land only would present other problems. The statute would have to define urban land and the differential treatment of non-urban land would have to be constitutionally justified. In any event, a very short

¹⁰² A related but distinctly different rationale for adverse possession is that it may be justified as a redistributive mechanism. See Peñalver & Katyal, *supra* note 20, at 1169-71. With urban squatters in mind, this recent article suggests that adverse possession may contribute to social good by enabling poor city dwellers to acquire apparently abandoned homes or home sites. *Id.* Under present statutes which require possession for seven years or more, urban squatters are likely to have the land sold out from under them by a tax sale before the statute would run out because persons who abandon land normally do not pay the taxes. *Id.* Peñalver and Katyal propose that the statutory period be reduced to one or two years. *Id.* at 1171. They also assert that true owners may protect their rights with “relative ease.” *Id.* at 1146. Regardless of what that means, there is no doubt that a much-shortened statutory period would increase monitoring costs. They also do not appear to take into account the various contexts that adverse possession may operate in within a single jurisdiction: urban, suburban, country, and wilderness. Finally, a one or two year statute may be unconstitutional as a taking of property without due process of law.

¹⁰³ See generally *id.*

¹⁰⁴ Fennell, *supra* note 20, at 1038.

¹⁰⁵ Peñalver & Katyal, *supra* note 20, at 1171.

¹⁰⁶ *Id.*

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statute of limitations may be held to involve an unconstitutional taking of property without due process of law.

It is also problematic that legislators and judges would be willing to accept the economic justification for “efficient trespass.” Finally, assuming that the argument for efficient trespass is economically sound, judges and policymakers may be inclined to be persuaded by moral arguments and the notion that theft is wrong and reject the efficiency argument.¹⁰⁷

2. The Lost Evidence and Quieting Title Rationales

The lost evidence rationale is familiar to most law graduates. It has been used to justify statutes of limitation applicable to various kinds of litigation and not just to lawsuits brought to assert property claims. Essentially, the argument is that as time passes, it becomes increasingly difficult or more costly to prove facts in litigation. Evidence is lost and memories fade.¹⁰⁸ The tranquility of society and the stability gained by giving plaintiffs a limited amount of time to sue—or lose the right—is a substantial social interest. However, the lost evidence rationale for adverse possession of real estate might have had more force in the past when comprehensive recording or title registration systems did not exist. The United States has had deed recording since colonial times.¹⁰⁹ Recording provides permanent evidence of title that does not fade or disappear with time. If adequate record evidence exists, the lost evidence rationale for adverse possession does not apply.

Adverse possession has served to clear a multitude of old claims of record. But it clears these claims regardless of their validity. And the long-term adverse possession doctrine does not formally take into account the merits of the possessory claims it protects. The usual approach is that it is irrelevant under long-term statutes whether the adverse possessor has any plausible claim to the title other than through the possession of the property.

By using records maintained in American recording or title registration systems, it is normally possible to identify with a high degree of accuracy the legal interest holders and adverse claimants and

¹⁰⁷ Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1876 (2007).

¹⁰⁸ See Merrill, *supra* note 63, at 1128.

¹⁰⁹ John L. McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age*, 18 WM. MITCHELL L. REV. 61, 67 (1992).

the nature of their interests or claims.¹¹⁰ Recordation of a document usually raises a rebuttable presumption that it was duly executed.¹¹¹ The certificate of acknowledgement, usually required by law for instruments to be entitled to recordation, not only contains evidence of valid execution, but it is a self proving document, admissible into evidence without any additional foundation being necessary.¹¹² Consequently, recordation provides presumptive evidence of title, placing the burden on the party contesting record title to produce evidence to prove that title is other than shown in the record.¹¹³ In a number of states, record title is further buttressed by marketable title or curative acts that make it more difficult to challenge record title or that cure defects in recorded documents. Clearly, the modern policy is to prefer record title to non-record claims.¹¹⁴ When the legal titleholder can be so identified and the validity of the holder's claim readily proved it is doubtful whether the adverse possession claimant should prevail solely on the basis of the "lost evidence/quieting title" rationale.

There are many instances where the doctrine of adverse possession has cleared record titles held by parties in possession from conflicting claims, record and off record.¹¹⁵ But it is not a very efficient title clearing doctrine because its application requires a set of often complex factual findings.¹¹⁶

¹¹⁰ See JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 343-44 (3d ed. 1989) (stating how recording systems have worked well enough to preclude a switch to title registration, which has almost completely failed in the United States).

¹¹¹ See, e.g., *Ferrell v. Stinson*, 11 N.W.2d 701, 703 (Iowa 1943).

¹¹² CRIBBET & JOHNSON, *supra* note 110, at 206.

¹¹³ *Ferrell*, 11 N.W.2d at 703; TIFFANY & JONES, *supra* note 31, at § 1044.

¹¹⁴ Adverse possession of real estate appears counter to this policy.

¹¹⁵ See ROBIN PAUL MALLOY & JAMES CHARLES SMITH, REAL ESTATE TRANSACTIONS 486-91 (2002). Marketable title acts can do this, also, without getting involved in the uncertainties and ambiguities involved in the application of the doctrine of adverse possession. *Id.* For example, under adverse possession, whether an owner is or was under a legal disability at the time the adverse claim was asserted may be important, but it is irrelevant under a typical marketable title act. *Id.* Marketable title acts operate by cutting off most interests that were recorded before the "root of title" unless the interests were preserved by re-recording after the root. *Id.* The root of title is a definite time period plus some additional time back to the most recent title transaction. *Id.* The definite time periods range from twenty-two to fifty years. *Id.* Generally, the claims of parties in possession are not extinguished. *Id.* But if an adverse possessor is no longer in possession, the adverse possession claim may be extinguished. *Id.*; see also Walter E. Barnett, *Marketable Title Acts – Panacea or Pandemonium*, 53 CORNELL L. REV. 45 (1967) (providing a good critique of marketable title acts).

¹¹⁶ CALLAHAN, *supra* note 39, at 76. Adverse possession will not quiet a possessory title if the possession has been for less than the period of the applicable statute of limitations. *Id.*

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On the other hand, adverse possession is a double-edged sword when it comes to quieting title.¹¹⁷ It may work in favor of a possessory claim to real estate against an apparently good record title, thus making the record title uncertain and in need of quieting. Furthermore, recording acts do not protect good faith purchasers from the risk that there may be a fully ripened adverse possession claim against real estate purchased for value even if there is no longer any indication of the possession.¹¹⁸

3. Psychological, Economic, and Reliance Based Rationales

The reliance rationale has been discussed by a number of authors.¹¹⁹ There are different versions of it. Some focus on the reliance of third parties that presume that the possessor is the owner. Other versions consider the reliance of the possessor. Justice Oliver Wendell Holmes focused on the reliance of the possessor who, “like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can’t be displaced without cutting at his life.”¹²⁰

According to various commentators, the phenomenon described by Justice Holmes, coupled with other factors, supports the doctrine of adverse possession. In one version, adverse possession may prevent a breach of the peace. The possessor has become so attached to the

Even if the possessory claim is older than the time period in the statute of limitations, adverse possession will not quiet it unless the statute has run. *Id.* One or more of the requirements of adverse possession may be unsatisfied or the running of the statute of limitations might have been suspended by the adverse claimant’s disability. *Id.* Generally, statutes of limitation also do not run against the holders of future interests. *Id.*

¹¹⁷ MALLOY & SMITH, *supra* note 115, at 483.

¹¹⁸ *Mugaas v. Smith*, 206 P.2d 332 (Wash. 1949). See also L.S. Tellier, Annotation, *Title by Adverse Possession as Affected by Recording Statutes*, 9 A.L.R. 2d 850 (1950). Stating that:

The rule is well settled that title by adverse possession is not affected by recording statutes—that the adverse title once obtained is good even as against those holding a title recorded as provided by statute, or a title derived from a recorded title—and this, regardless as to whether or not the adverse holder continued in actual or visible possession after having perfected his title by adverse possession

Id.

¹¹⁹ Merrill, *supra* note 63, at 1131-32.

¹²⁰ Letter from Oliver Wendell Holmes to William James (Apr. 1, 1907), reprinted in *THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS* 417, 417-18 (Max Lerner ed., 1943).

property that an attempt by the titleholder to assert rights may lead to violence.¹²¹

Another related rationale attempts to explain adverse possession on the basis of loss aversion theory and related psychological experiments.¹²² Briefly, the core of this explanation is that the experiments show that people prefer to keep what they have rather than exchange it for something else of apparently equivalent value. Experiments also show that the subjective impact of losses is greater than equivalent gains. Additionally, experiments indicate that people perceive a greater loss when they are denied tangible objects than when they are denied intangibles of the same value. From this, it is concluded that “when forced to place a loss on someone, the law chooses to deprive R[ightful] O[wner] of his financial asset rather than deprive A[dverse]P[ossessor] of her tangible asset.”¹²³

The proponent of this rationale, Professor Jeffrey Evans Stake, admits that the theory “is far from perfect.”¹²⁴ In addition to the problems Stake identifies, there is a basic question that should be addressed. How does loss aversion subjectively perceived by possessors form legal doctrine, court decisions, and statutes? The judges and legislators who made the law did not face the potential loss themselves. Did the people who made the doctrine apply norms derived from how they would feel if they were in the shoes of the true owner and the adverse possessor? Finally, versions of adverse possession appear in ancient cultures, medieval England, and in various diverse cultures throughout the present world. It is possible that the results of the psychological experiments that Professor Stake relies on may be culturally influenced or determined. The same experiments may yield different results when the subjects are of a different society and culture. If so, then they may not explain the adverse possession rules of that society.

Professor Stake’s loss aversion theory of adverse possession is preliminary and incomplete. Nevertheless, at the very least he has identified a path of inquiry that may lead to an increased understanding of adverse possession and perhaps other legal doctrines.

¹²¹ See Merrill, *supra* note 63, at 1131 (explaining that under the personality theory of property rights, it has been argued that the adverse possessor may also have an attachment to the property that is critical to the possessor’s personal identity).

¹²² See Stake, *supra* note 63, at 2471.

¹²³ *Id.* at 2434-56.

¹²⁴ *Id.* at 2469.

There are also reliance rationales that make use of economics. Some economic theories focus on investments (*e.g.*, construction or improvements) made by the adverse possessor in the property.¹²⁵ If the adverse possessor has to buy the land to protect the investment, the true owner may be able to require the possessor to pay the owner not only the value of the land, but also the non-salvageable cost of the investment (quasi-rents). It is claimed that the amount of the recovery by the true owner is unfair because it is a disproportionate penalty for the wrong committed and is economically inefficient.¹²⁶

Suppose it is assumed that this theory provides a rationale for adverse possession in typical encroachment cases or other instances where the adverse possessor made valuable improvements on the land. The theory still does not explain adverse possession where the possessor acquires the land without making any valuable improvements or investments.¹²⁷ Furthermore, if an improvement is involved, removal may not be required even if there is no adverse possession right giving the possessor the right to leave it in place. The remedy of the owner may be limited to damages.¹²⁸

Finally, Thomas Merrill has identified another flaw in the argument: it does not take into account the significance of the passage of time. To ripen into ownership, adverse possession must continue for at least the time period provided in the applicable statute of limitations (*e.g.*, ten years). However, the problem of appropriation of rents and strategic bargaining will arise the moment the adverse possessor completes the permanent improvement even if a great deal of time must pass in the future before the statute of limitations will run out.

¹²⁵ *Id.* at 2434-56 (providing some economics based arguments which may explain or support the doctrine of adverse possession).

¹²⁶ See Merrill, *supra* note 63, at 1131; Miceli & Sirmans, *supra* note 97, at 161.

¹²⁷ See Miceli & Sirmans, *supra* note 97, at 167. The authors state that “[s]ome states require the presence of improvements or enclosure for the possessor to satisfy the open and notorious requirement. This also conforms with the theory, because improvements are the primary source of appropriable quasi rents.” *Id.* This includes sunk costs, the value added by the improvement which the title owner might be able to demand from the possessor in a bargain to sell the possessor the property. *Id.* Of course, most states do not require the presence of improvements or an enclosure, and in some an enclosure requirement may be satisfied by a cheap wire fence, hardly a significant “quasi rent.” *Id.* See also TIFFANY & JONES, *supra* note 31, at § 1138.

¹²⁸ See, *e.g.*, Penelko, Inc. v. John Price Assocs. Inc., 642 P.2d 1229 (Utah 1982) (owner not entitled to an injunction ordering possessor to remove improvements because that would involve substantial economic waste and damages would be adequate).

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Merrill refers to another category of reliance interests, those of third parties who may have an interest in whether ownership has transferred from the title owner to the possessor. Merrill mentions “vendors, creditors, contractors, tenants, [and] subsequent purchasers of all or part of the property for value.”¹²⁹ Merrill does refer to the availability of reliable ownership information in public records. “But it simply is not feasible to expect every interested third party to perform a title search before extending credit to, providing services for, or purchasing an interest from someone who appears to be a T[rue] O[w]ner.”¹³⁰

Merrill’s comment is overly general. It is rare for anyone to purchase a valuable real estate interest without a title search and examination, included in the package of services title insurance companies normally provide.¹³¹ When a borrower intends to secure a lender by a mortgage on real estate, the lender will almost always demand a title search and examination. On the other hand, there are some situations of the type described by Merrill, where there could be reliance on possession inaccurately indicating ownership. A lender, in assessing personal credit, with no mortgage involved, may consider the value of real estate possessed by the person without ordering a title examination. However, the creditor may not even verify that the borrower is actually in possession of the subject property. In such cases, there would be no reliance on possession as indicative of title.

4. The Reliance Rationale is Really a “Reliability” Rationale

One of the problems with reliance rationales for adverse possession is that no proof of reliance is required by the legal doctrine.¹³² This is because the legal doctrine is not aimed at protecting specific actual reliance on a possessor being the owner. However, what commentators refer to as “reliance” is at the foundation of a variety of legal doctrines including adverse possession,¹³³ common law marriage, and perhaps other doctrines such as equitable adoption¹³⁴ or promissory estoppel.

¹²⁹ Merrill, *supra* note 63, at 1132.

¹³⁰ *Id.*

¹³¹ See Robin Paul Malloy & Mark Klapow, *Attorney Malpractice for Failure to Require Fee Owner’s Title Insurance in a Residential Real Estate Transaction*, 74 ST. JOHN’S L. REV. 407 (2000).

¹³² See, e.g., N.Y. REAL PROP. ACTS. LAW §§ 512 & 522 (1979). Cultivation, improvements, or construction of enclosures may be required as proof of possession, but there is no need to show that these acts were in reliance on having ownership. *Id.*

¹³³ See Gerstenblith, *supra* note 6, at 124.

¹³⁴ See generally Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 766-806 (1984) (discussing equitable adoption).

"Reliance" may be involved, but the term does not describe or identify a primary interest at stake. The doctrines support the reliability of social expectations derived from "the language of interaction" as well as attaching consequences to changes of position in reliance on such expectations. If people are treated or act like owners or married people for some period of time, then they, and third parties, may expect to some level of probability that they are owners or married. From this perspective, the reliance explanation should be called the "reliability" rationale.

Lawyers tend to think of material reliance as involving a change in position of the party to the party's detriment. In social interaction, there may be reliance, detrimental or otherwise, on behavioral norms as applied to particular facts. However, such norms may be enforced regardless of reliance on them.

B. The Meaning of Reliability a.k.a. "Reliance"

The general doctrine of estoppel is one of the most familiar legal doctrines based on reliance. A contract version, promissory estoppel, makes some promises enforceable even though they are not in contracts based on consideration.¹³⁵ The heart of traditional promissory estoppel is "action or forbearance on the part of the promisee..." to the promisee's detriment, *i.e.*, detrimental reliance. Sometimes promises may be enforced even though there is no consideration or demonstrated detrimental reliance.¹³⁶

Adverse possession or informal marriage may also involve reliance, perhaps detrimental reliance. An adverse possessor may rely on being the owner by, for example, constructing an improvement on the land. Third parties may rely on the possessor being the owner by extending credit to the possessor. In an informal marriage, one or both of the parties may rely on being married by failing to formalize the marriage or

¹³⁵ See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

¹³⁶ *Id.* See also Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the Invisible Handshake*, 58 U. CHI. L. REV. 903 (1985). After analyzing over two hundred promissory estoppel cases, Professors Farber and Matheson concluded that courts did not always require actual detrimental reliance as a prerequisite to enforcing certain promises on the basis of promissory estoppel. *Id.* Other scholars have questioned their research and conclusions. See, e.g., Juliet P. Kostritsky, *The Rise and Fall of Promissory Estoppel or is Promissory Estoppel Really As Unsuccessful As Scholars Say It Is: A New Look at the Data*, 37 WAKE FOREST L. REV. 531 (2002); Robert A. Hillman, *Questioning the "New Consensus On Promissory Estoppel: An Empirical And Theoretical Study*, 98 COLUM. L. REV. 580 (1998).

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by declining to execute wills or trusts that will confer at least the equivalent of a surviving spouse's share. Third parties may rely on the couple being married by, for example, a title insurance company insuring that they hold title as tenants by the entirety, an estate available only to married couples.

But proof of reliance on having the legal status of "owner" or "spouse" is required by neither adverse possession nor common law marriage doctrine. Both doctrines require publication of the ownership¹³⁷ or marriage¹³⁸ claim, but no proof at all of whether anyone has relied on the claim is required. Publication, however, creates a potential for reliance. Expectations may be enforced not only because people have relied on them; they may also be enforced so that people may rely on them.¹³⁹ Social science theory helps to explain how and why this occurs.

1. Property and Marriage are Similar Social Institutions

The function of marriage in social organization is well and widely understood.¹⁴⁰ It is also useful to think of property ownership as an aspect of social organization. Property or property-like rights are "necessary, if only to organize the world in ways that all individuals know the boundaries of their own conduct."¹⁴¹ Property rules define the relationships between persons with respect to the subjects of property, tangible and intangible. Property rules may be laws, but customary rules or norms may confer property-like rights.¹⁴²

Marriage creates something like a property relationship between the spouses. Certain property aspects of marriage are readily apparent and

¹³⁷ Adverse possession must be "open and notorious."

¹³⁸ Common law spouses must "hold themselves out" to the public as being married.

¹³⁹ Lon Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*: 1, 46 YALE L. J. 52, 62 (1936).

¹⁴⁰ Marriage is the basis of the family. In preliterate times, it served as an important component of kinship organizations, e.g. tribes and clans. Marriage served to cement alliances between tribes and clans and that function continued after the rise of the modern state. Marriage enabled kinship relations not based on blood, real or fictional. See EDWARD B. TYLOR, *ANTHROPOLOGY* 247 (Leslie A. White ed., 1960) (1881). For example, in Europe, members of ruling classes of various nation states cemented alliances by intermarriage between families. *Id.*

¹⁴¹ Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 121, 123 (1979).

¹⁴² See Carol M. Rose, *Possession as the Origin of Property*, 52 CHI. L. REV. 73, 81 (1985) (describing a Chicago "property-like" claim based in custom: "In my home town of Chicago, one may choose to shovel snow from a parking space on the street, but in order to establish a claim to it one must put a chair or some other object in the cleared space.").

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well-known. For example, in all but one of the common law marital property states, the surviving spouse has the right to claim an elective share of the decedent spouse's estate.¹⁴³ In the community (or marital) property states, the earnings of spouses are pooled at the instant of acquisition and are equally shared.

However, the relationship between property and marriage involves more than just some inter-spousal property rights. Property and marriage are both social and legal institutions founded on behavioral norms.¹⁴⁴ These norms create legally or socially based expectations between owners and other persons in society. They also create such expectations between marriage partners and other people.

2. The "Language of Interaction" is the Foundation of Both Adverse Possession and Common Law Marriage

The term "social structure" has various meanings. In this Article, the term is used to refer to normative patterns that describe the expectations that people should have about the probable behavior of other people in particular situations or contexts.¹⁴⁵ Social organization requires behavioral predictions. In various contexts, people must be able to anticipate what is expected of them and they must be able to predict what others are likely to do. These socially derived predictions should be reasonably reliable. The required degree of reliability and specificity depends on the context. Team sports, such as basketball and football, and military operations usually require a high degree of predictability of behavior among persons on the same team or side. The participants must be able to accurately anticipate the behavior of the people on their side and, to the extent they can, that of their opponents as well, in a fluid context.

¹⁴³ See GA. CODE ANN. §§ 53-1-3, 53-2-9(b) (1997); see also Peter H. Strott, *Preventing Spousal Disinheritance in Georgia*, 19 GA. L. REV. 427 (1985); Mary F. Radford & F. Skip Sugerman, *Georgia's New Probate Code*, 13 GA. ST. U. L. REV. 605 (1997).

¹⁴⁴ FULLER, *supra* note 14, at 148. The term "norm" is used in at least two different senses in sociological discourse. *Id.* In one sense, it refers to rules assigning legal or social consequences to certain described acts. *Id.* In the sense used here, "behavioral norm" refers to shared beliefs about what people may expect of others' particular social encounters. *Id.* Lon Fuller defined "social norm" to include "precepts eliciting dispositions of the person, including a willingness to respond to somewhat shifting and indefinite 'role expectations.'" *Id.* See also LOPEZ & SCOTT, *supra* note 15, at 24-26 (providing a further discussion of the meaning of "norm" as used in this latter sense).

¹⁴⁵ LOPEZ & SCOTT, *supra* note 15, at 3.

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The specificity of the predictions needed also depends on the context. A complex manufacturing operation requires sophisticated and detailed ordering which may include, among other organizers, multiple and complex contracts and detailed directions based on custom or written rules. On the other hand, informal social gatherings may function satisfactorily with nothing more than the expectations derived from some general rules of etiquette.

Legal scholars have observed the importance of socially generated expectations and the part they play in organizing society.¹⁴⁶ One of Lon Fuller's nine principles of social ordering was "[t]he coordination of expectations and actions that arises tacitly out of interaction; illustrated in 'customary law' and 'standard practice.'"¹⁴⁷ According to Fuller, some "rules of customary law . . . serve directly to regulate, and set limits to, man's purposively directed interactions with one another."¹⁴⁸ Fuller described customary law as "a language of interaction,"¹⁴⁹ stating:

To interact meaningfully men require a social setting in which moves of the participating players will fall generally within some predictable pattern. To engage in effective social behavior men need the support of intermeshing anticipations that will let them know what their opposite numbers will do, or that will at least enable them to gauge the general scope of the repertory from which responses to their actions will be drawn. We sometimes speak of customary law as offering an unwritten code of conduct.¹⁵⁰

3. Social Norms are the Source of the Language of Interaction

The term "social norm" has various meanings.¹⁵¹ The term may be used to refer to behavioral rules that ascribe particular sanctions if the

¹⁴⁶ See, e.g., LON L. FULLER, *ANATOMY OF THE LAW* 73 (Frederick A. Praeger ed., 1968); Hubert Rottleuther, *A Purified Sociology of Law: Niklas Luhmann on the Autonomy of the Legal System*, 23 *LAW & SOC. REV.* 779, 783 (1989).

¹⁴⁷ FULLER, *supra* note 14, at 170.

¹⁴⁸ FULLER, *supra* note 14, at 73.

¹⁴⁹ FULLER, *supra* note 14, at 213.

¹⁵⁰ *Id.* (quoting an essay Fuller wrote in 1969).

¹⁵¹ FULLER, *supra* note 14, at 148. The expression "social norm" may be used "to embrace indifferently, on the one hand, rules attributing legal or social consequences to overt and specifically defined acts, and, on the other, precepts eliciting dispositions of the person, including a willingness to respond to somewhat shifting and indefinite 'role expectations.'" *Id.*

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rule is not obeyed.¹⁵² For the purposes of this Article, the term is used to refer to rules or standards establishing expectations that guide interaction.

Legal commentators usually distinguish “law” from “social norms.”¹⁵³ As used herein, a custom is a type of social norm. Social norms may also be laws if adopted as such by governments.¹⁵⁴ Through this process, a single customary rule may also become, or serve as a basis for, a separate rule of law. The custom is not wiped out simply because it has served as a basis for a governmentally adopted law. For example, suppose there is a custom that when two drivers arrive at an intersection at the same time, the driver on the left yields to the driver on the right. The custom may later become the basis of a law to the same effect. People may continue to follow the custom without any idea that there is an identical or similar law. Sometimes people will guide their behavior in accordance with customary norms with little or no regard for formally promulgated ones.¹⁵⁵ Law, of course, influences custom and may supersede it.

C. *Statuses, Roles, and Social Positions*

1. Spouses and Owners Occupy Social Positions

Some social scientists use the terms “status” and “role” to refer to defined positions in social systems and the expected behaviors

¹⁵² See, e.g., ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 126-27 (1991).

¹⁵³ See, e.g., ELLICKSON, *supra* note 152, at 127; RICHARD POSNER, FRONTIERS OF LEGAL THEORY 288 (2004).

¹⁵⁴ See, e.g., THE UNIFORM COMMERCIAL CODE § 1-205 (Standard Version 2003). The UCC may make a “usage of trade,” a custom, a legal norm. *Id.* Courts also make customs law when they adopt customs in making decisions. At the time of adoption, the custom and the law may remain identical or diverge, then or sometime later.

¹⁵⁵ For example, when the author worked as a supply clerk in the U.S. Army, he observed that the supply department followed customary rules with infrequent reference to the printed rules promulgated by the Army (which were quite complex and somewhat incomprehensible). See ELLICKSON, *supra* note 152, at 131. Under Robert Ellickson’s classification, the printed rules could be classified as either organization rules or laws. *Id.* Custom may also diverge from legally enforceable contract rules. For example, in residential real estate transactions in the Chicago area, it was customary for the buyer’s lender to order the title insurance even though the routinely used sales contract forms required the seller to procure and present the preliminary report or commitment for title insurance. Formally, the seller was obliged, but it was expected that the buyer’s lender would actually order the title insurance.

associated with those positions.¹⁵⁶ “Roughly, a role involves a patterned set of expectations regarding modes of behavior as well as the mental states, such as intentions, desires, and beliefs, that are thought to properly underlie or accompany the expected behavior.”¹⁵⁷ Class or social position identifiers and their associated norms enable people to predict how others are likely to behave in particular contexts.¹⁵⁸ These predictions provide guidance about how people should behave in return.

Marriage and property ownership are social institutions. “Institutions are social arrangements that channel behavior in prescribed ways . . .”¹⁵⁹ They are composed of interrelated elements: norms, values, and role expectations that contribute to the maintenance of social order.¹⁶⁰ It is obvious that “wife,” “husband,” and “spouse” may refer to particular social positions. It is not so apparent that property ownership may be defined in social position terms. The key is to focus on the social relations involved and not on the things of value, the subjects of property. When a person occupies a particular “property” social position, the norms that define the position also generate expectations about how the occupant and other members of society should behave toward the property and each other.¹⁶¹

2. Identifying Social Positions

Before people can anticipate the behavior of others, they must be able to comprehend signals that identify status, class membership, or other categories that denote expected behaviors.¹⁶² For example, the rules of etiquette apparently followed by an individual may identify status (*i.e.*, social position) or class.¹⁶³ Dress is a common way that people identify status or class membership. In some organizations, dress

¹⁵⁶ Robert K. Merton, *The Role-Set: Problems in Sociological Theory*, 8 BRIT. J. SOC. 106, 110 (1957).

¹⁵⁷ Meir Dan-Cohen, *Between Selves and Collectivities: Toward a Jurisprudence of Identity*, 61 U. CHI. L. REV. 1213, 1218 (1994).

¹⁵⁸ LESLIE A. WHITE, *THE EVOLUTION OF CULTURE* 227 (1959).

¹⁵⁹ D. Stanley Eitzen & Maxine Baca-Zinn, *Social Institutions*, in CONFLICT AND ORDER 47 (9th ed. 2006).

¹⁶⁰ *Id.* Eitzen and Baca-Zinn describe how they think institutions evolve over time. *Id.* In their view, institutions develop because they generate expectations that promote social stability. *Id.*

¹⁶¹ See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

¹⁶² Edwin J. Thomas & Bruce J. Biddle, *Basic Concepts for the Properties of Role Phenomena*, in *ROLE THEORY: CONCEPTS AND RESEARCH* 46, 49 (Bruce J. Biddle & Edwin J. Thomas eds., 1966).

¹⁶³ Kingsley Davis, *Social Norms*, in *ROLE THEORY: CONCEPTS AND RESEARCH* 105, 109 (Bruce J. Biddle & Edwin J. Thomas eds., 1966).

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identifiers are very clear and precise. Perhaps the best examples are military and certain religious organizations. Uniforms indicate the military or organization the wearer belongs to, and rank insignia clearly signal the exact social position (or status) in a hierarchy of positions.

3. Identifying Spouses and Owners

Although documentary evidence may exist to identify a couple as married, people normally rely on how a couple behaves toward each other to identify them as married in ordinary social interaction. The behavioral norms indicating a marriage relationship are not uniform through time and social contexts and the message they send is not that the parties are certainly married, but that there is some probability that they are. The probability depends on the specific context.¹⁶⁴ Except in a few situations, there is no “clear set of norms . . . in the social stratosphere that uncontroversially mark[s] some relationships as marital and others as nonmarital . . .”¹⁶⁵ Only when valuable property interests are involved is it likely that marriage certificates may be required as proof of marriage. Even then, interested parties may accept “acting married” as sufficiently indicative of the fact of marriage.

In lawsuits where the fact of marriage is in issue, a certificate of marriage will not conclusively establish the fact. A marriage certificate is only *prima facie* evidence of marriage. In some cases, that evidence will not be enough. If there is evidence that there was no marriage, it may be necessary for a court to establish the fact of marriage based on testimony or other evidence. If a marriage certificate is not introduced into evidence, a marriage can still be proved.¹⁶⁶ In both cases, “acting married” provides the proof that the couple was married.

Property ownership may be revealed from documents and from governmentally maintained records but, like the behavior of persons apparently married to each other, possession is commonly used in ordinary social interaction to identify probable owners. But more

¹⁶⁴ Generally, the signals that a relationship is a marriage may include, among others: 1) there are two persons and no more in the relationship (polygamy is prohibited); 2) they are of opposite gender (if gay marriage becomes more common, this signal will lose significance); 3) the couple spends a lot of time together (this may be signaled by how they speak to each other and what they say); 4) it appears that they cohabit at least some of the time; 5) they have a long standing relationship; 6) they are not of widely different chronological ages; and 7) they may imply that they are married or may state it explicitly.

¹⁶⁵ Dubler, *supra* note 50, at 973.

¹⁶⁶ Stein, *supra* note 12, at 281. Proof of cohabitation and holding out by the couple that they are married may raise a presumption that a valid ceremonial marriage took place.

evidence will be required where valuable interests may be at risk if there is no ownership or the ownership is defective or incomplete.

The social foundation of both adverse possession and common law marriage is the language of interaction. Possession, perhaps joined with other indicia of ownership, creates an expectation that the possessor is the owner. A couple that “acts married” is considered married by other people and not parent and child or brother and sister. In both situations, the common factor is not reliance, which may be involved, but publication of signals received in the context of social norms that identify a probable owner or married couple. Adverse possession must be “open and notorious” and common law marriage doctrines require a “holding out” to others that the couple is married.

VI. CONCLUSIONS

A. Adverse Possession Should Be Limited and Common Law Marriage Should Be Expanded

This Article has shown that the foundation of the legal doctrines of adverse possession and common law marriage is social norms that generate expectations that certain possessors are owners and some couples are married. This is not an exclusive and comprehensive explanation of adverse possession, common law marriage, their recognition, non-recognition in particular cases, and all the forms they may take.

Ultimately, this Article concludes that in its present form, the legal doctrine of adverse possession of real estate is no longer justified by present social and economic conditions.¹⁶⁷ The doctrine has been handed down from a past when documentary proof of title was nonexistent or often hard to access, a time when land title record systems did not exist. Accordingly, possession played a greater role in publicizing claims to ownership. People still have some expectations that possessors are likely owners. However, better evidence of ownership will be required when valuable economic or other interests are at stake. The adverse possession doctrine should be reformed in light of current policies and prevailing social and economic conditions. Long-term adverse possession should

¹⁶⁷ Adverse possession of personal property is also permitted and there are no central registries of personal property interests equivalent to those maintained for real estate. Personal property, like people, is movable, thus making the design and administration of central registries for personal property more difficult.

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be abolished and short-term adverse possession should be modified by focusing on its utility as a title-clearing device.

Generally, property law should promote the policies of security of ownership and facility of transfer. Security of ownership means that title to property should not be diminished or lost except through the consensual act of the owner or through some specific legal process, such as foreclosure, condemnation, or execution. Facility of transfer means that purchasers and certain other transferees should be able to acquire an interest in real estate promptly, inexpensively, and with assurance that the title is as indicated by the official land title records.

Adverse possession works against these policies as well as in their favor. It promotes the security of title claims of those in possession. But it also works to coercively strip even record owners of title, sometimes without requiring the possessors to be in good faith. It promotes facility of transfer by clearing some titles, but it also clouds other titles and creates a risk that there is a matured adverse possession claim that will be good even against a good faith purchaser of the land, even though there is no physical or record indication of the claim.¹⁶⁸

Adverse possession is also contrary to the modern policy favoring record title over adverse non-record claims. Additionally, the expectations of the possessor, and other people, that the possessor is the owner, may not be entitled to great weight given the effectiveness of modern land title record systems in publicizing the ownership claims of record owners. The recording and title registration systems in the United States indicate the actual state of titles with a high degree of reliability.

It is arguable that adverse possession of real estate should be completely abolished. A Torrens system of title registration operated in Illinois for almost 100 years without adverse possession. Currently, in Minnesota, what is probably the best managed Torrens title registration system in the United States operates very well without any doctrine of adverse possession.¹⁶⁹ However, both the Minnesota and Illinois Torrens

¹⁶⁸ Title insurance will usually cover this risk but real estate buyers want land not insurance claims.

¹⁶⁹ The author is referring to Hennepin County (Minneapolis), Minnesota. This statement is mainly based on a personal visit by the author of this Article to the Hennepin County Torrens office in 1990 and published references by others to the office.

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systems used possession-based approaches to handle some disputes involving boundaries and implied easement claims.¹⁷⁰

1. Boundary Disputes are Better Settled by Practical Location of Boundaries Doctrines than by Long-term Adverse Possession

Long-term adverse possession has been justified as a boundary dispute settlement device.¹⁷¹ The doctrine of practical location of boundaries is an alternative tool that does not have the negative aspects of adverse possession. Generally, practical location of boundaries cannot be used to “steal” a tract of land and does not have as much potential for creating title problems. Experience with Torrens in Minnesota indicates that some form of the doctrine of practical location of boundaries—a fraternal twin of adverse possession—may be an economically efficient and desirable way of dealing with some boundary and related disputes.

There is a need for some doctrine to deal with boundary disputes. Surveying is an art, not an exact science. A survey is really a professional opinion about, among other things, the location of boundary lines.¹⁷² Locating a boundary line is not just a simple matter of reading a legal description and using it to draw a line on the ground.¹⁷³

¹⁷⁰ *Carter v. Michel*, 87 N.E.2d 759 (Ill. 1949) (unregistered implied easement claim only apparent from possession); Bergh, *supra* note 17, at § 3.24. Minnesota’s practical location of boundaries doctrine as applied to Torrens registered land is quite narrow. See *In re Petition of Building D. Inc.*, 502 N.W.2d 406 (Minn. Ct. App. 1993).

¹⁷¹ TIFFANY & JONES, *supra* note 31, at § 1155 (1975). Short-term adverse possession under color of title is not an effective boundary dispute settlement tool. *Id.* When color of title is required, the invalid instrument or other writing under which the claimant holds defines the scope of the claim including its boundaries. *Id.* An adverse possessor under color of title is deemed to have constructive possession of the entire tract described in the writing. *Id.* However, constructive possession extends only to the portion of the described tract the claimant intends to possess that is not in possession of another. *Id.* Furthermore, possession in excess of the boundaries described in the instrument giving color of title is not adverse as to such excess. *Id.* Therefore, short-term adverse possession under color of title does not apply to settle boundary disputes where the boundaries on the ground are in conflict with the boundaries described in the instrument giving color of title. *Id.*

¹⁷² Mitchell G. Williams & Harlan J. Onsrud, *What Every Lawyer Should Know About Title Surveys*, in LAND SURVEYS: A GUIDE FOR LAWYERS AND OTHER PROFESSIONALS 3 (Mitchell G. Williams ed., Amer. Bar Ass’n 2000); see also JOYCE PALOMAR, 1 PATTON AND PALOMAR ON LAND TITLES § 152 (West 2007).

¹⁷³ See LYLE W. MALEY & WILLIAM A. THUMA, LEGAL DESCRIPTIONS OF LAND 23 (Chicago Title and Trust Company 1966) (1955). When land is platted, boundary location is usually simplified. *Id.* But the location of the boundaries is still a matter of professional judgment:

It has been well said that THERE IS NO MAGIC IN A RECORDED PLAT. The plat is subject to errors, uncertainties and conflicts. It is but a picture, drawn by the surveyor from the field notes he made when surveying and staking out the subdivision. It and the field notes are

The surveyor's opinion is based on examination of historical and other documentary evidence and the physical condition of the property. Surveyors may reasonably disagree about the location of boundary lines because they have different professional opinions. And, of course, surveyors sometimes err when determining the locations of boundaries. Consequently, legal descriptions in conveyancing documents will not always be perfectly consistent and reliable.

It would be costly or inconvenient to have a final administrative or judicial determination of boundaries at the time a document containing a legal description is recorded or registered under a Torrens act. The determination will involve not only the owner of the subject property but also owners of adjacent properties.¹⁷⁴ Normally, adjacent property owners do not have to be notified when conveyancing documents are recorded in a recorder's office or registered under a Torrens act.¹⁷⁵ However, if there will be a determination of boundaries that will be binding on them, they should be given notice and an opportunity to be heard.¹⁷⁶ Involving adjacent owners might create costly litigation that otherwise might never arise. Additionally, boundary disputes frequently involve small amounts of land. Therefore, some doctrine, such as practical location of boundaries, is needed to resolve, efficiently, boundary disputes when they do ripen into actual controversies. Practical location doctrines also tend to confirm actual expectations of the adjoining landowners.¹⁷⁷ Finally, these doctrines are an economically desirable way of minimizing the cost of boundary and building line

secondary evidence of his acts; the primary evidence consists of his 'official footsteps,' namely the monuments (usually stones or iron pipes) in the ground, that he located or planted to mark the lines and corners of the subdivision.

Id.

¹⁷⁴ If the rights of adjacent owners are going to be adjudicated, it will be necessary to give them notice and opportunity to be heard under due process provisions of state or federal constitutions.

¹⁷⁵ See, e.g., BERGH, *supra* note 17, at § 3.32 (discussing how neighbors have to be notified when there is an application to register boundaries, either upon initial registration or in a proceeding subsequent to registration).

¹⁷⁶ See *Texaco v. Short*, 454 U.S. 516 (1982); *Wichelman v. Messner*, 83 N.W.2d 800 (Minn. 1957). Notice and opportunity to be heard is required by due process clauses of state and federal constitutions. *Id.* If the determination of boundaries was not binding for a long time, notice and opportunity to be heard at the time of the determination might not be required. *Id.*

¹⁷⁷ See *Wichelman*, 83 N.W.2d at 800 (describing how Minnesota, which does not permit adverse possession of land registered under its Torrens Act, does apply the doctrine of practical location of boundaries to some boundary dispute cases involving land registered under its Torrens Act).

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errors involving encroachments.¹⁷⁸ Long-term adverse possession should be replaced by practical location of boundaries doctrines with modifications that might be necessary.¹⁷⁹

2. Short-Term Adverse Possession is Necessary to Clear Titles of Parties in Possession Under Color of Title

On the other hand, short-term adverse possession in some form is still necessary to clear titles of parties in possession under color of title. There is no ready replacement for it as is the case with long-term adverse possession. One of the fundamental principles of Torrens title registration is called “curtain.” Once a title transfer is registered the registration is largely conclusive – the title is as registered. The current registration provides a curtain between the present and past transactions involving the title. Normally, it is unnecessary to go back and examine the history of past transactions to determine the current state of the title. With some important exceptions, past claims not appearing in the current registration are extinguished. Short-term adverse possession is the closest counterpart to this for titles maintained under the recording acts found in all states.

The defects cleared by short-term adverse possession may be record or off record. Some examples are a claim that a transferor received only a life estate and not a fee under a prior recorded conveyance¹⁸⁰ or a ripened adverse possession claim that is not recorded or publicized by current possession.¹⁸¹ There is simply no other legal device that can provide the title clearing function that adverse possession does. Recording acts only work to clear titles of prior unrecorded claims that could have been recorded.¹⁸² Marketable title acts only clear some claims that are not recorded after a point in the fairly distant past called the “root of title.”¹⁸³ Additionally, marketable title acts have exceptions for certain interests that are not cleared even if they last appeared in the record before the root of title.

¹⁷⁸ See Miceli & Sirmans, *supra* note 97, at 162-65.

¹⁷⁹ See Lawrence Berger, *Unification of the Doctrines of Adverse Possession and Practical Location in the Establishment of Boundaries*, 78 NEB. L. REV. 1 (1999) (proposing unifying practical location doctrines and long-term adverse possession).

¹⁸⁰ See, e.g., *Ellis v. Bartlett*, 172 N.E.2d 768 (Ill. 1961).

¹⁸¹ See, e.g., *Mugaas v. Smith*, 206 P.2d 332 (Wash. 1949).

¹⁸² JOHN L. MCCORMACK, *RECORDING, REGISTRATION & SEARCH OF TITLE*, THOMPSON ON REAL PROPERTY § 92.04 (David A. Thomas ed., 2002).

¹⁸³ *Id.* at § 92.11.

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Short-term adverse possession is not as likely as long-term to create defects that undermine the recording act policy that title claims should be recorded. Commonly, the instrument giving the possessor color of title will be recorded. Long-term claims do not have to be evidenced by writings and even ripened ones do not have to be of record.

The current law of short-term adverse possession needs some fine-tuning. The statutes from state to state share the “color of title” requirement, but the cases indicating what the term means are not consistent. There is also no unanimity about what else should be required. Some statutes require the possessor to be in “good faith” or to have paid the property taxes. This is an appropriate case for the development of a model or uniform statute by some appropriate body. The persons who might develop the model statute should be guided by an understanding that it should be aimed at providing the curtain that Torrens title registration laws provide by making the title as registered largely conclusive. They should also be sensitive to avoidance of title clouding effects of adverse possession.

3. Common Law Marriage Should be Retained and Extended to More Jurisdictions

Common law marriage protects the legitimate expectations of the parties and of the people who interact with them. Third party reliance in common law marriage situations is more entitled to protection than such reliance in adverse possession because of the unavailability of adequate records that could be used to search the titles of marriages. Thus, the doctrine should be retained and extended to more jurisdictions.

Judicial economy and administrative convenience do not justify prohibition of informal marriage. People acting like they are married may be the best available evidence that they are married. Not all formal marriages are certified, and certificates of them may be lost or unavailable. Marriage certificates are not very reliable evidence of the existence of a marriage as of a particular time. Verifying the facts about a marriage from public documents is more difficult than confirming facts about real estate ownership from them. Land does not move which makes it easier to centralize the appropriate records. By contrast, marriages may be formed or dissolved in many places around the world. The cost involved in proving an informal marriage in court is not usually very great. Furthermore, laws permitting registration of informal marriages, as in Texas, would allow informal marriages to be certified

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removing any administrative or proof advantage that certified formal marriage presently has.

Other reasons given for prohibiting common law marriage—prevention of fraud or protection of the family—are also not very persuasive. Common law marriages must be publicized by the parties “holding themselves out” as married to third parties, and that is equal to the protection against fraudulent claims of marriage provided by witnesses to an official ceremony and registration of a formal certificate. There is insufficient evidence that formal marriage requirements do more to protect the family than those applicable to the formation of common law marriages. It is remotely possible some public health interest might be served by marriage license health test requirements for marriage licenses. However, this interest may be outweighed by privacy interests.

In a time when the state has moved away from regulating the internal relationship of marriage partners, prohibition of common law and other informal marriages is the anachronism. The power of the state should not be used to coerce conformity to particular ideas about the proper circumstances under which people may relate to each other privately unless there is a sufficient state interest that justifies the intrusion.¹⁸⁴

Professor Cynthia Bowman and others have stated that the people who erroneously expect that they are common law spouses are likely to be poor or members of minority groups.¹⁸⁵ It appears that there may be group social norms recognizing common law marriage in conflict with prevalent norms in some situations. Defeating the expectations of a couple and people who interact with them reasonably believing that they are married should be justified only by some substantial countervailing interest. And, in the view of this author, no such interest has been identified.

¹⁸⁴ For example, to protect minors, the state can set a minimum age for consent to a marriage, formal or common law.

¹⁸⁵ Bowman, *supra* note 51, at 709-10, 765-70.